

**KENTUCKY PERSONNEL BOARD
MINUTES OF NOVEMBER 14, 2014**

1. The regular monthly meeting of the Kentucky Personnel Board was called to order by Chairman Doug Sapp on November 14, 2014, at approximately 9:30 a.m., 28 Fountain Place, Frankfort, Kentucky.

Board Personnel Present:

Wayne "Doug" Sapp, Chairman
Larry B. Gillis, Vice Chairman
David B. Stevens, Member
Tommy W. Chandler, Member
Donald W. "Don" Blevins, Member
Amanda Cloyd, Member
Mark A. Sipek, Executive Director and Secretary
Boyce A. Crocker, General Counsel
Linda R. Morris, Administrative Section Supervisor
Cynthia Perkins, Administrative Specialist

Board Personnel Absent:

David F. Hutcheson, Jr., Member

2. **READING OF THE MINUTES OF REGULAR MEETING HELD OCTOBER 10, 2014**

The minutes of the last Board meeting had been previously circulated among the members. Chairman Sapp asked for additions or corrections. Mr. Blevins moved to approve the minutes, as submitted. Dr. Stevens seconded and the motion carried 6-0. The Board members signed the minutes.

3. **EXECUTIVE DIRECTOR'S REPORT**

Mr. Sipek stated that the Personnel Board has been invited to give a presentation at the Governor's EEO conference to be held on November 20, 2014. Mr. Sipek stated that he, along with Mr. Crocker, Mr. Gillis and Ms. Cloyd will be part of the presentation.

At the conclusion of Mr. Sipek's report, Chairman Sapp called for the Personnel Cabinet's report.

4. **PERSONNEL CABINET'S REPORT**

Hon. Dinah Bevington, Executive Director, came forward to present the Personnel Cabinet's report.

Ms. Bevington stated that open enrollment for the Kentucky Employee's Health Plan (KEHP) went smoothly. The Cabinet answered 41,000 phone calls, mostly related to password set-ups and how to get in the system). New vendors will start January 1, 2015 and employees will get new health insurance cards.

Compared to other government entities, the Commonwealth of Kentucky has been ranked first in the 2014 Best Adoption-Friendly Workplaces. The state offers employees reimbursement for adopting and up to twelve weeks of FMLA leave.

Ms. Bevington stated that the Personnel Cabinet will be hosting the Governor's EEO conference to be held on November 20, 2014.

Ms. Bevington stated that state employees have been notified and signs will be posted of the Tobacco Free ban, which takes effect November 20, 2014.

Ms. Bevington mentioned that the audit of the 2013 performance evaluations was completed and will be shared with the Board next month.

Following the Personnel Cabinet's report, Chairman Sapp then called the parties forward for the first oral argument.

5. **ORAL ARGUMENTS**

A. **Francisco Barroso v. Cabinet for Health and Family Services (2014-024 and 2013-268)**

The Hon. Jennifer Wolsing announced the parties would pass on oral argument due to discussing settlement.

B. **Melissa Hill v. Cabinet for Health and Family Services (2014-048)**

Present for oral arguments were counsel for Appellant, the Hon. Michael Boylan, and counsel for Appellee, the Hon. Mona Womack. After presenting oral arguments, the parties answered questions from the Board.

**C. Elizabeth Littlejohn v. Justice and Public Safety Cabinet (Corrections)
(2014-050)**

Present for oral arguments were counsel for Appellant, the Hon. Michael Boylan, and counsel for Appellee, the Hon. Ed Baylous. After presenting oral arguments, the parties answered questions from the Board.

D. Shanion Thurman v. Department of Public Advocacy (2010-255)

Present for oral arguments were counsel for Appellant, the Hon. Michael Boylan, and counsel for Appellee, the Hon. Brian Scott West. After presenting oral arguments, the parties answered questions from the Board.

6. MOTIONS

A. Bethany Cook v. Justice and Public Safety Cabinet (Corrections) (2013-098)
-- Motion to Accept Appellant's Exceptions as Timely Filed

Present were counsel for Appellant, Hon. Mike Moulton, and counsel for Appellee, Hon. Ed Baylous.

After brief discussion, Judge Chandler moved to accept Appellant's exceptions (via e-mail) as timely filed. Dr. Stevens seconded and the motion carried 6-0.

Mr. Sipek noted that the Board will get a copy of Appellant's exceptions and Appellee's response for consideration. Mr. Sipek stated that the Board may consider deferring this matter to next month.

Chairman Sapp suggested it may be time to update the Personnel Board's administrative regulations to enable electronic filings.

B. Nicole Hunt v. Cabinet for Health and Family Services Cabinet (2013-161)
--Appellant's Motion to Exclude Appellee's Exceptions

According to his calculations, Mr. Sipek stated that the Appellee's exceptions were timely filed within five working days.

Mr. Gillis moved to deny Appellant's motion to exclude Appellee's exceptions. Dr. Stevens seconded and the motion carried 6-0.

7. CLOSED SESSION

Mr. Blevins moved that the Board go into Executive Session for the purposes of discussing complaints, proposed or pending litigation, and deliberations regarding individual adjudications. Dr. Stevens seconded. Chairman Sapp stated that the motion had been made and seconded for the Personnel Board to retire into closed Executive Session, passed by a majority vote of the members present, with enough members present to form a quorum. Pursuant to KRS 61.810(1) (c), (f), and (j), the Kentucky Open Meetings Act, the Board will now retire into closed Executive Session. Specific justification under the Kentucky Open Meetings Act for this action are as follows, because there will be discussion of proposed or pending litigation against or on behalf of the Board; and deliberations regarding individual adjudication. The motion carried 6-0. (11:00 a.m.)

Mr. Gillis moved to return to open session. Dr. Stevens seconded and the motion carried 6-0. (11:50 a.m.)

8. CASES TO BE DECIDED

The Board reviewed the following cases. At that time, the Board considered the record including the Hearing Officers' findings of fact, conclusions of law and recommendations, any exceptions and responses which had been filed, and oral arguments where applicable.

A. Francisco Barroso v. Cabinet for Health and Family Services (2014-024 and 2013-268)

With the parties agreeing to defer oral argument and advising the Board that the parties are discussing settlement, Mr. Gillis moved to defer this matter to the next Board meeting. Ms. Cloyd seconded and the motion carried 6-0.

B. Melissa Hill v. Cabinet for Health and Family Services (2014-048)

Ms. Cloyd moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 6-0.

C. Elizabeth Littlejohn v. Justice and Public Safety Cabinet (Corrections) (2014-050)

Judge Chandler moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 6-0.

D. Shanion Thurman v. Department of Public Advocacy (2010-255)

Mr. Blevins moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 6-0.

**E. Kimstance Johnson v. Justice and Public Safety Cabinet (Corrections)
(2013-216) - Deferred from October Meeting**

Mr. Gillis moved to note Appellant's exceptions, Appellee's response and oral arguments and to accept the Final Order dismissing the appeal, as attached to the minutes. Dr. Stevens seconded and the motion carried 6-0.

**F. Ronald Nunemaker v. Justice and Public Safety Cabinet (Corrections)
(2013-262) - Deferred from October Meeting**

Mr. Blevins moved to note Appellant's exceptions and oral arguments and to accept the Final Order sustaining the appeal, as attached to the minutes. Ms. Cloyd seconded and the motion carried 6-0.

G. Nicole Hunt v. Cabinet for Health and Family Services (2013-161)

Mr. Gillis moved to note Appellant's exceptions, Appellee's response [Appellant's motion to exclude Appellee's exceptions having been denied by the Board] and oral arguments and to accept the recommended order dismissing the appeal. Judge Chandler seconded and the motion carried 6-0.

**H. Bethany Cook v. Justice and Public Safety Cabinet (Corrections) (2013-098)
After Remand**

With the Board having accepted Appellant's exceptions as timely filed by e-mail, Mr. Gillis moved to defer this matter to the next Board meeting. Mr. Blevins seconded and the motion carried 6-0.

I. Eric Brinegar v. Cabinet for Health and Family Services (2014-047)

Mr. Gillis moved to accept the recommended order dismissing the appeal. Ms. Cloyd seconded and the motion carried 5-1, with Mr. Blevins opposing.

J. Matthew Cook v. Finance and Administration Cabinet (2014-162)

Judge Chandler moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 6-0.

K. Teresa Hall v. Finance and Administration Cabinet (2013-286)

Ms. Cloyd moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 6-0.

L. Wade Hester v. Finance and Administration Cabinet (2013-042)

Mr. Gillis moved to accept the recommended order sustaining the appeal to the extent of Appellee purging from its files any and all records relating to the subject investigation of Appellant and dismissed with reference to Appellee having placed Appellant on special leave with pay pending an investigation. Mr. Blevins seconded and the motion carried 5-0, with Ms. Cloyd recusing due to participation in mediation.

M. William Nathan Jones v. Public Protection Cabinet (2013-253)

Judge Chandler moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 5-0, with Mr. Gillis recusing because he has a personal relationship with a witness.

**N. Lee A. Karsner v. Justice and Public Safety Cabinet (Corrections)
(2014-121)**

Mr. Gillis moved to accept the recommended order sustaining the appeal to the extent that the Appellee failed to timely respond to Appellant's grievance and dismissed as to Appellant's claim for restoration of sick time as untimely appealed. Mr. Blevins seconded and the motion carried 6-0.

O. David Stephanski v. Cabinet for Health and Family Services (2014-031)

Mr. Gillis moved to accept the recommended order (with clerical correction) sustaining the appeal to the extent that the five-day suspension was reduced to a three-day suspension. Dr. Stevens seconded and the motion carried 6-0.

P. Dean Tomlinson v. Energy and Environment Cabinet (2014-014)

Judge Chandler moved to accept the recommended order dismissing the appeal. Dr. Stevens seconded and the motion carried 5-0, with Mr. Gillis recusing because he has a personal relationship with a witness.

Q. Cecilia Turley v. Justice and Public Safety Cabinet (Corrections) (2013-230)

Dr. Stevens moved to accept the recommended order dismissing the appeal. Mr. Gillis seconded and the motion carried 6-0.

Show Cause Orders – No Response Filed – Appeals Dismissed

Mr. Blevins moved to find that the Appellant had not responded to the show cause order and that the recommended order be accepted dismissing the appeal for failure to timely prosecute the appeal. Judge Chandler seconded and the motion carried 6-0.

R. James Byrd v. Justice and Public Safety Cabinet (Juvenile Justice)

9. WITHDRAWALS

Dr. Stevens moved to accept the following withdrawals of appeals *en bloc* and dismiss the appeals. Mr. Blevins seconded and the motion carried 6-0.

- A. David R. Brock v. Cabinet for Health and Family Services
- B. William Maurice Brown v. Cabinet for Health & Family Services and Bob James
- C. Joshua Bynum v. Finance and Administration Cabinet
- D. Angela Coots v. Cabinet for Health and Family Services
- E. Tammy Graham (Skinner) v. Justice and Public Safety Cabinet (Corrections)
- F. Eric Irvin, Sr. v. Justice and Public Safety Cabinet (Corrections)
- G. Rebecca Perry v. Cabinet for Health and Family Services and Personnel Cabinet
- H. Daniel Ray v. Justice and Public Safety Cabinet (Corrections)
- I. Hamid Rezvanian v. Transportation Cabinet and Personnel Cabinet
- J. David Riggins v. Transportation Cabinet
- K. Jacqueline Storey v. Cabinet for Health and Family Services
- L. Gregory Ulrich v. Transportation Cabinet and Personnel Cabinet
- M. Thomas M. Smith v. Cabinet for Health and Family Services (2 appeals)

10. SETTLEMENTS

- A. Carolyn Benedict v. Public Protection Cabinet
- B. Jacqueline Gadd v. Justice and Public Safety Cabinet (Juvenile Justice)
- C. Larry Graves v. Cabinet for Health and Family Services
- D. Jeanne Hinkebein v. Justice and Public Safety Cabinet (Corrections) (3 appeals)
- E. Heather Losser v. Justice and Public Safety Cabinet (Corrections) (2 appeals)
- F. Patricia Oaks v. Justice and Public Safety Cabinet (Juvenile Justice)
- G. Danielle Trim v. Cabinet for Health and Family Services

Dr. Stevens moved to accept the settlements *en bloc* as submitted by the parties, and to sustain the appeals to the extent set forth in the settlements. Mr. Blevins seconded and the motion carried 6-0.

11. **OTHER**

Settlement Agreement Guidelines

Ms. Dinah Bevington was present on behalf of the Personnel Cabinet.

Mr. Sipek stated that he met with the General Counsel and other staff members at the Kentucky Retirement Systems (KRS) to discuss final orders of the Board as it pertains to settlements. Appellants awarded back pay, disciplinary action set aside, leave time reimbursed etc. have an impact on retirement benefits. KRS needs a Board Order similar to what the Board sends them now.

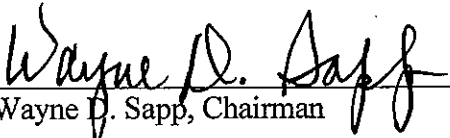
Mr. Sipek proposed an addition to the Settlement Guidelines that if an agency or employee has any questions or concerns regarding the impact on retirement benefits that they needed to contact KRS. Mr. Sipek further stated that KRS is willing to assist the Board with this matter and they are willing to consider ideas presented by the Board. However, if KRS does not receive a Board order on settlements, retirement benefits or retirement credit will not be considered.

The Board discussed possible language for Board Orders. KRS' statute requires a Board Order. Ms. Bevington asked if the Order would state the appeal is dismissed. Mr. Sipek stated that the word "dismissed" cannot be used, because Personnel Board's use of the word means the Appellant gets nothing. The words "sustained" or "sustained to the extent" needs to be used. Ms. Morris suggested, "The Board orders that the attached settlement be sustained to the extent and implemented." Mr. Sipek stated that the Board needs further time to come up with language that will work for the Board, as well as Retirement. Judge Chandler stated that the Board still has the option of rejecting a settlement. It was determined that this matter should be deferred to next month.

Board Meeting Schedule for 2015

Mr. Sipek and Mr. Crocker usually attend the Kentucky Association of Administrative Adjudicators (KAAA) training which is scheduled on the second Friday, May 8, 2015, and requested the Board's meeting date be rescheduled. The Board members agreed to schedule its meeting for Friday, May 15, 2015.

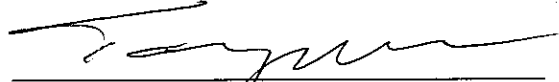
There being no further business, Mr. Gillis moved to adjourn. Ms. Cloyd seconded and the motion carried 6-0. (12:25 p.m.)

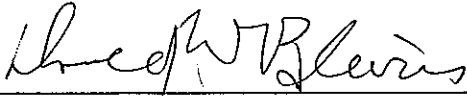

Wayne D. Sapp, Chairman


Larry Gillis, Vice Chairman

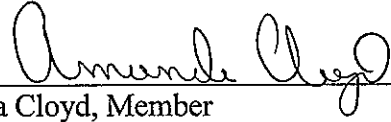


David B. Stevens, Member


Tommy W. Chandler, Member



Donald W. Blevins, Member



Amanda Cloyd, Member

**COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2013-216**

KIMSTANCE JOHNSON

APPELLANT

**V. FINAL ORDER SUSTAINING HEARING OFFICER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND
RECOMMENDED ORDER AFTER REMAND
AS ALTERED**

**JUSTICE AND PUBLIC SAFETY CABINET
DEPARTMENT OF CORRECTIONS
J. MICHAEL BROWN, APPOINTING AUTHORITY**

APPELLEE

** ** ** ** **

The Board at its regular November 2014 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order After Remand of the Hearing Officer dated August 21, 2014, having noted Appellant's exceptions, Appellee's response, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order After Remand of the Hearing Officer be altered as follows:

A. **Delete** Analysis of Americans with Disabilities Act (ADA) paragraph 3 and substitute the following:

3. The ADA prohibits discrimination on the basis of disability. Discrimination occurs when an employer takes adverse employment action because of a disability or when an employer fails to make reasonable accommodations. 42 USC §12112 (b) (5) (A). The Appellee relied on the case of *Peltier v. U.S.*, 388 F.3d 984 (6th Cir., 2004) for the position that placing an employee on paid leave is not an adverse employment action. *Peltier* involved a case where a female former employee of the Federal Bureau of Alcohol, Tobacco and Firearms alleged gender and disability discrimination and was placed on administrative leave while being investigated. The court held that "a suspension with pay and full benefits pending a timely investigation

into suspected wrongdoing is not an adverse employment action.” Citing *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d. 789, 803 (6th Cir. 2004). This is not analogous to Appellant’s situation. She was placed on directed sick leave using her own paid sick leave because her employer did not believe she could perform the essential functions of her job with or without accommodation. The Board finds that under the facts of this case, placing the Appellant on directed sick leave constitutes an adverse employment action. See also *Ashley Lewis v. Cabinet for Health and Family Services*, Personnel Board Appeal No. 2014-058, decided October 15, 2014. (Specifically, Finding of Fact No. 2.)

B. **Delete** Conclusion of Law number 2 and substitute the following:

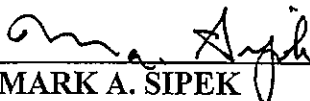
2. The Hearing Officer concludes as a matter of law that the placing of the Appellant on directed sick leave with pay was an adverse employment action under the facts of this case.

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order After Remand of the Hearing Officer, as altered, be and they hereby are approved, adopted and incorporated herein by reference as a part of this Order and that the Appellant’s appeal be **DISMISSED**.

The parties shall take notice that is Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
SECRETARY

A copy hereof this day mailed to:

Hon. Stafford Easterling
Hon. Neal Hayes
Bobbie Underwood

- B. **Delete** Findings of Fact numbers 8 and 9 and substitute the following:

8. The Board finds there is no credible evidence that the Appellant engaged inmates in provocative conversation or unnecessarily agitated the inmates while following his orders and ordering the SAP inmates out of the gym at 5:30 p.m. The Board thus finds the Appellant did not engage in any activity that could have endangered the security of the staff, inmates or the NTC in violation of the NTC Policy No. 03-02-01, Prohibited Employee Conduct, Paragraph (7)(k).

- C. **Renumber** paragraphs 10 and 11 to paragraphs 9 and 10.

- D. **Delete** Findings of Fact number 12 and substitute the following:

11. The Board finds the evidence does not demonstrate the suspension of Appellant was for good cause.

- E. **Renumber** paragraph 13 to paragraph 12.

- F. **Delete** Conclusion of Law number 3 and substitute the following:

3. The Board concludes the Appellee did not show that a three-day suspension for Appellant was taken for good cause. The Board concludes Appellant followed his orders and in so doing was put in a difficult situation, but did not endanger inmates or staff or violate any policy in following orders from his superiors by adhering to the schedule for gym usage.

G. Delete the Recommended Order.

IT IS HEREBY ORDERED that the appeal of **RONALD C. NUNEMAKER VS. JUSTICE AND PUBLIC SAFETY CABINET, DEPARTMENT OF CORRECTIONS (APPEAL NO. 2013-262)** is **SUSTAINED**, that the three-day suspension of Appellant be expunged from his record, the Appellant receive back pay for the three days suspension, and that he otherwise be made whole. The Board orders Appellee to reimburse Appellant for any leave time he used attending the evidentiary hearing, any pre-hearing conferences, and oral argument at the Board. [KRS 18A.105, KRS 18A.095(25), and 200 KAR 12:030.]

IT IS FURTHER ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer as Altered be, and they hereby are, approved, adopted and incorporated herein by reference as a part of this Order and the Appellant's appeal is **SUSTAINED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 19th day of November, 2014.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK SECRETARY

A copy hereof this day mailed to:

Hon. Angela Cordery
Ronald C. Nunemaker
Bobbie Underwood